# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 74-1343

ROBERTO GOMEZ-ROJAS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Following a jury trial in the United States District Court for the Western District of Texas, petitioner and another were convicted of possessing 300 pounds of marijuana with intent to distribute, and of conspiring to commit that offense, in violation of 21 U.S.C. 846 and 841(a)(1).[1] Petitioner was sentenced to concurrent terms of five years' imprisonment, to be followed by five years' special parole. The court of appeals affirmed (Pet. App., pp. 1a-21a; 507 F.2d 1213). Petitioner contends that he is entitled to a retrial at which the prosecution must make available as a witness an alleged informant and participant in petitioner's crime.

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[1]Michael Rece Sutherlin was tried and convicted with petitioner. Sutherlin, but not petitioner, had claimed to have been entrapped. The court of appeals reversed Sutherlin's conviction on the ground that incorrect entrapment instructions had been given to the jury (Pet. App., pp. 12a-13a, 21a).

The facts are fully set forth in the opinion of the court of appeals. Petitioner's co-defendant Michael Sutherlin arranged to sell a quantity of marijuana for $22,500 to Special Agent Phillip DeHoyos of the Drug Enforcement Administration. George Smith introduced Sutherlin to DeHoyos and arranged a meeting between them. When DeHoyos complained about Sutherlin's price, Sutherlin stated that price was beyond his control: "I just set up deals for my man and he takes care of the prices and delivers it" (Pet. App., p. 2a). Sutherlin then showed DeHoyos a sample of the marijuana and DeHoyos displayed his cash. Following a telephone conversation between Sutherlin and an unknown person, Sutherlin told DeHoyos that the sale could be completed. Sutherlin departed after arranging to meet DeHoyos later at a neighborhood restaurant.

Sutherlin and DeHoyos met as arranged and engaged in conversation until petitioner drove into the parking lot of the restaurant. Sutherlin told DeHoyos, "that is my man" (Pet. App., p. 3a). Sutherlin spoke alone with petitioner for several minutes and then returned to tell DeHoyos to have Smith rent a car in which to transport the marijuana. Smith arrived with a rental car, and Sutherlin told DeHoyos that his supplier would take the car, load it with marijuana, and deliver it to a prearranged location. Petitioner, who had left while Sutherlin and DeHoyos spoke, returned to the parking lot and had another private conversation with Sutherlin.

Pursuant to Sutherlin's instructions, DeHoyos left the rental car in a lot adjacent to a car dealership at which petitioner was employed. Petitioner drove the rental car into the auto dealership lot, where an unidentified individual in a Cadillac traded vehicles with petitioner; that individual drove the rented car to an undiscovered location (evading several federal agents).

Sutherlin and DeHoyos met again at a motel where the rental vehicle was returned, its trunk loaded with 300 pounds of marijuana. Petitioner was arrested while sitting in his car parked 100 feet from the motel.

At trial, Sutherlin testified on his own behalf; he claimed that he had been entrapped by Smith, whom he alleged to be the source of the contraband, and that petitioner was an innocent bystander. Petitioner denied any knowledge of the marijuana transaction.

1. Petitioner apparently contends that he was denied due process of law by being unable to "confront" Smith.[2] He asserts that, since the evidence against him was circumstantial, it was the government's duty to provide Smith's testimony in order to cast additional light on the facts of the case.[3] But the government was not obliged to offer the testimony of every available witness to petitioner's offense. It needed to provide only enough evidence to show, beyond a reasonable doubt, that petitioner is guilty. The court of appeals examined the evidence against petitioner and correctly concluded that it is sufficient to sustain the conviction (Pet. App., pp. 13a-14a). See *Glasser* v. *United States*, 315 U.S. 60, 80. Petitioner's activities on the day in question—including removing and returning the rented car—were more than sufficient to implicate him in the crime. It was not necessary for the government to call Smith.

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[2]Smith did not testify and was not a witness against petitioner. The Sixth Amendment right to confrontation therefore is not implicated in this case, although petitioner uses the term "confront" in several places. At all events, petitioner, having failed to raise a "confrontation" issue on appeal, may not raise that issue now. *Lawn* v. *United States*, 355 U.S. 339, 362; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2.

[3]Contrary to petitioner's contention (Pet. 14, 16), this case does not involve the problem of the "informer's privilege". That "privilege" allows the government to withhold from defendants the name of an informant. See *Roviaro* v. *United States*, 353 U.S. 53. But Smith, the informer here, was in court and known to petitioner. Indeed, Smith was subpoenaed by both petitioner and his co-defendant. When called on *voir dire* Smith indicated that he would not testify, and he did not take the stand (Tr. 14-18). Petitioner does not allege that Smith's testimony would have been directly exculpatory, only that the evidence against him was insufficient.

2. Petitioner also claims that the failure of the district court to compel Smith to testify prejudiced his ability to present an entrapment defense. Because this contention was not raised below, it should not be considered here. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2. It is, in any event, unavailing.

Petitioner seems to claim that he is entitled to acquittal under *United States* v. *Bueno*, 447 F.2d 903, 906 (C.A. 5), affirmed on remand, 470 F.2d 154 (C.A. 5), certiorari denied, 411 U.S. 949, if the government supplied the contraband. But petitioner did not present an entrapment defense at trial. He claimed instead that he had no connection with the sale. The *Bueno* defense would be available only to a defendant who had participated in the transaction. Entrapment is not available as a defense to one who claims that he did not participate in the crime. *Canal Zone* v. *Risbrook*, 454 F.2d 725 (C.A. 5); *United States* v. *Barrios*, 457 F.2d 680, 682 (C.A. 9); *United States* v. *Carter*, 326 F.2d 351, 353 (C.A. 7); *United States* v. *Shameia*, 464 F.2d 629 (C.A. 6). But cf. *Hansford* v. *United States*, 303 F.2d 219 (C.A.D.C.) (*en banc*).

Finally, petitioner contends (Pet. 14-15) that Smith's testimony would have had a bearing upon Sutherlin's credibility. Apparently petitioner argues that if Smith's account of the sale corroborated Sutherlin's, that would not only have established Sutherlin's entrapment defense but also, by enhancing Sutherlin's credibility, have added greater weight to Sutherlin's exculpatory testimony concerning petitioner. That argument is, of course, based upon sheer speculation. But if in fact Smith's account corroborated Sutherlin's, it would do so by incriminating Smith

himself. Smith would of course have been privileged to refuse to provide such testimony. There was therefore no reason for him to have been called as a government witness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JULY 1975.